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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KENNETH KAY McKALL, Defendant and Appellant.	A123369 (San Francisco City & County Super. Ct. No. 203383)

Charged in a two-count information, defendant Kenneth Kay McKall pled guilty to contempt (count 2; Pen. Code, § 166, subd. (a)(4)), stood jury trial resulting in guilt of selling heroin (count 1; Health & Saf. Code, § 11352, subd. (a)), and had enhancement and probation-affecting allegations tried by the court, resulting in true findings for three prior narcotics convictions (Health & Saf. Code, §§ 11370. subds. (a) & (c), 11370.2).

Defendant was sentenced on October 2, 2008, to a low term of three years for the heroin count plus three consecutive three-year enhancements for the three priors, less credits, with the sentence for count 2 stayed. He appeals, claiming abuse of discretion in three particulars: (1) the admission of a prior sale of heroin under Evidence Code sections 1101 and 352,[1] (2) the admission of priors to impeach him, and (3) the refusal to strike any of his three-year priors findings in the interests of justice. We find no such abuse, but persuaded by supplemental briefing that defendant is entitled to additional presentence credits, will modify the judgment.

[1] All further section references are to the Evidence Code unless otherwise stated

I. BACKGROUND

The trial evidence showed without dispute that, in a buy-bust operation around 9:30 p.m. on October 11, 2007, undercover Officer Daniel Silver, posing as a heroin addict, received from defendant .44 grams of a substance containing heroin, and gave defendant $20 in marked funds recovered afterward when defendant was arrested on a signal from a cover officer, Sergeant Michael Browne. How to construe the exchange was disputed. The prosecutor argued that it was a sale or giving away of heroin. Defense counsel, opening his jury argument with the lament, "No good deed goes unpunished," urged that it was an act of compassion by defendant, an addict himself, who was taken in by the officer's act and entrapped into giving his drugs to a "dope-sick" fellow user.

Officer Silver testified that he was adept at mimicking drug users needing a "fix" and that night wore a "punk rock" outfit with "spiked" jacket, and was carrying a skateboard, when he saw defendant seated on a jacket or blanket next to an unknown Black male in an alcove at 251 Turk Street near Jones Street, an area notorious for heroin sales. As a "buy officer," Silver would make purchases with marked bills and signal a cover officer to have a separate team of officers move in for the arrest and the recovery of marked funds.

Defendant was talking with the Black man, whom Silver thought was a customer. Silver approached, looking "slightly hungered" for heroin, and asked defendant if he had "any more." Defendant asked how much he needed, and Silver said "20"—meaning $20 worth. Defendant nodded and showed what he had in his hand. Silver gave him $20 in marked money, which defendant accepted. Silver took the heroin, walked away and gave a "bust" signal to cover Officer Browne, who was in an alcove across the street and a bit east. Silver was unsure which was handed over first, the money or the drugs, but the whole interaction took 30 seconds or less. Silver did not interact with the man next to defendant.

Officer Browne's view from across the street was partly obscured by parked cars and by Silver having his back to Browne. Browne did not see the hand-to-hand exchange or much below chest height but saw defendant and the man beside him, saw Silver

approach, saw Silver's brief contact with defendant, and saw him walk away and give the bust signal. Browne radioed for the arrest team, saw them detain both men in the alcove, met up with Silver down the block to find out exactly what occurred, saw defendant arrested, and then confirmed with Silver that they had arrested the right man.

The arresting officers searched defendant and recovered the marked funds from a right front jacket pocket. The substance Silver got from defendant weighed .44 grams, a usable amount of tar heroin, and was in a form typical for street sale. The search of defendant revealed no other drugs or money, nor any paraphernalia for using the heroin. The other suspect was not identified or arrested, evidently because Silver identified only defendant as the seller.

Defendant testified that he had been using heroin for 17 years, would shoot up (use intravenously) for "maintenance" two or three times a day if he could, and lived in shelters, hotels, or on the street. As general impeachment at the start of his testimony, defendant admitted having unspecified prior felonies from 2002 and 2006, plus a heroin sale conviction from May 2007. The latter conviction was explored factually because, as will be detailed in part II.B. (*post*), that one event had been explored in other testimony for the limited purposes of showing knowledge, plan, or scheme (§ 1101, subd. (b)).

The evening of his arrest was a miserable one, defendant recalled. He lay in the alcove feeling "dope sick," when a young heroin dealer he knew as Mario came up, noticed his condition, and asked him to look at some heroin he had. Defendant had only four paper dollars and another three in change. Mario was interested in just the paper dollars, and wanted him to test the drug to see if it was "street ready." Defendant did so by injecting himself with a syringe of heroin Mario had, also smelling and tasting it. Mario then showed defendant a piece of tar heroin. Defendant had it in his hand, negotiating a price, when Silver came up and asked, "You all got any more of that?"

Silver was convincingly "animated" and insistent, like a dope sick user. He got "in [defendant's] face," squatted down, put his hand on defendant's knee, and showed him tattoos around his neck. Defendant was not "in a sharing mood" and told him: " 'Get off of me,' " and " 'Man, who are you?' " When Silver seemed to make a grab for

the drug, defendant closed his fist around it, and Mario interjected: " 'Man, the guy might be sick. And I am trying to help you, man.' " Thinking Mario might take the dope from him and give it to Silver, defendant asked Silver, " 'Are you a cop, man?' " Silver assured: " 'Hell, no, I am not a cop. Give me the dope. I am sick like you.' " After Silver had implored about 30 times, saying no one else would help him and "doing what we call a dope fiend shuffle," defendant felt "flattered," a little sorry for the guy, and wanted him to go away. He told Silver that, if he was not a cop, he would "give him this," at which Silver snatched the heroin out of defendant's hand, stepped away like he was leaving but, to defendant's surprise, came back with a $20 bill between his fingers, saying: " 'I hope it's good, man. Can I come back later?' "[2] This was "like a stroke of luck from heaven," and Mario and defendant both grabbed for the bill. Mario got it, but it slipped out of his hand and fell to defendant's feet. Defendant planted a foot on it, and Mario told him: " 'Keep that. I got something for you.' " Then officers descended on them, pushing Mario to the wall and demanding to know where the money was. Defendant did not put the money in his pocket. He had an injection kit in a backpack behind him in the alcove.

Defendant explained further, on cross-examination, how he got by as an addict: "[T]he Tenderloin is a very sociable area where narcotics are very available. Sometimes you ask for help, if you need help. Sometimes you solicit for help. Sometimes you wash cars. Sometimes you help people move in and out of hotels. Sometimes you look for work. But your main objective is not the money. The objective is to get something for your addiction." This exchange followed. "Q. Sometimes you sell drugs, right? [¶] A. No, I do not. [¶] Q. You don't sell drugs? [¶] A. No, I do not. [¶] . . . [¶] Q. On this date you sold drugs to Officer Silver; didn't you? [¶] A. No, I didn't. [¶] Q. You didn't take the $20? [¶] A. The $20 was offered as a gift or a tip. It was not given in the manner of asking for any money. It was, like, gee whiz, thank you, man. . . ."

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[2] Defendant did not mention it in his initial testimony but later said he broke off a piece to keep for himself before offering it to Silver.

After that exchange, the court revisited its pretrial ruling that, for general impeachment purposes, the nature of defendant's felony priors would not be revealed. After further argument, the court ruled that the prosecutor could refer to the unidentified 2006 prior as a possession for sale but that the nature of the 2002 prior would remain unstated. This exchange ensued in the cross-examination that followed: "Q. Now, your attorney asked you about a 2002 conviction. You have a conviction from that; right? [¶] A. That is correct, sir. [¶] Q. You also have a conviction in 2006, a felony possession-of-heroin for sale conviction. [¶] A. That is true. [¶] Q. And you also have the May 200[7] conviction as well, for that sale. [¶] . . . [¶] A. Yes."

On redirect examination, defense counsel returned to defendant's explanation of the May 2007 sale. Defendant called his arrest and guilty plea in that case "a very bad experience," adding: "I really had caught myself, promising that I was really never going to do anything like that again." That last remark led the prosecutor to seek further modification of the impeachment ruling, urging that the remark "opened the door" to explore facts of the 2006 prior. The court agreed with a defense position that 2006 facts could not logically impeach a 2007 resolve, but ruled that the prosecutor could explore defendant's feelings about his 2006 arrest and conviction "without going into detailed facts about the case." On recross-examination, when asked why he had felt he would never do something like that again, defendant explained: "A. I felt bad, stupid, about the encounter I had with the police. [¶] Q. Did you feel that way in 2006? [¶] A. Not necessarily. It was stupidity and anger. [¶] Q. What about in October [2007]? [¶] . . . [¶] A. Horrible."

II. DISCUSSION

A. *Impeachment with Priors*

Prior offenses are relevant to credibility to the extent that "[m]isconduct involving moral turpitude may suggest a willingness to lie [citations]." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296.) Defendant does not dispute that his prior felony convictions

were relevant as involving moral turpitude,[3] but he claims abuse of discretion in not excluding them as unduly prejudicial (§ 352) and, further, in ultimately allowing the nature of the 2006 incident (fn. 3, *ante*) to be explored in specific response to defendant's testimony. We find no such abuse.

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[3] The People offered four incidents in their trial brief. The earliest, resulting in a May 2002 conviction, was described only as a sale of cocaine base (Health & Saf. Code, § 11352, subdivision (a)).

An incident from January 2004 did not result in conviction: "Officers Daniel Cole and Eric Lederer were in plain clothes conducting a narcotics surveillance operation in the area of Eddy Street and Hyde Street. Officer Cole observed an individual, later identified as Defendant [McKall] engaging in brief conversations with people on the street. Officer Cole observed an individual later identified as Jamie Crisco approach Defendant. Crisco handed [him] an unknown amount of currency which Defendant accepted. In exchange, Defendant opened his hand revealing several small white objects of suspected base rock cocaine. Crisco selected one of the white objects and Defendant handed the selected object to Crisco. Officers arrested Crisco and recovered the rock of cocaine base. Officers then located Defendant, but they were unable to locate any additional narcotics."

A January 2006 incident led to multiple charges and a plea-based conviction for a single reduced offense of selling cocaine base (Health & Saf. Code, § 11352, subd. (a)): San Francisco Officers "were conducting a buy-bust operation on Jones Street. Officer Kahri Gill-Kehoe was the buy officer. [He] encountered Defendant on Jones Street and asked him if he had anything. Defendant stated 'yeah' and removed cocaine base and heroin from his waistband. Officer Gill-Kehoe gave Defendant $40 of marked city funds. In exchange, Defendant sold [the officer] the cocaine base and heroin. When officers arrested Defendant, they recovered the marked city funds and heroin."

Last was a May 2007 incident that resulted in conviction for yet another sale of cocaine base: San Francisco Officers "were conducting a buy-bust operation on Jones Street. Officer Sylvia Petrossian was the buy officer. [She] encountered Defendant on Jones Street and asked him if he had heroin. Defendant stated 'yeah, follow me.' [The officer] followed [him], and together they approached an individual later identified as Gerald Thomas. Defendant had a conversation with Thomas. Thomas handed Defendant some heroin. Defendant then handed the heroin to Officer Petrossian. In exchange, [the officer] handed Defendant $20 of marked city funds. When officers arrested Defendant, they recovered the marked city funds and heroin. Officers also recovered heroin from Thomas."

1. The initial ruling. "As with all relevant evidence . . . , the trial court retains discretion to admit or exclude evidence offered for impeachment. [Citations.] A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing [that] the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; § 352.)

The court's initial, pretrial ruling was sound. Faced with four prior incidents, the prosecution's need to counter any false aura of veracity should defendant testify (*People v. Turner* (1994) 8 Cal.4th 137, 201), and a risk that all four incidents, being drug-related, might be misused by the jury, the court first eliminated entirely the 2004 incident, which had not resulted in conviction. The court had just ruled the facts of the 2007 offense admissible for the distinct, limited purpose of showing knowledge, plan, or scheme, but it left to defense counsel the strategic decision whether to reveal the nature of the 2002 and 2006 convictions, or simply refer to them as felonies. The ruling was, of course, consistent with the law that the facts of prior offenses are usually not revealed for general impeachment. (*People v. Shea* (1995) 39 Cal.App.4th 1257, 1267.) The court also found, without contrary argument here, that the felonies—ranging from five years to just five months before the charged offense—were "not too remote in time." (Cf. *People v. Turner*, *supra*, 8 Cal.4th at p. 200 [11 years not too remote where the defendant had not led a legally blameless life since then]; *People v. Davis* (2009) 46 Cal.4th 539, 602 [17 years not too remote where all but three were spent in prison].)

When it came time for defendant to testify, his counsel began by having defendant admit all three convictions, referring to the 2002 and 2006 convictions only as felonies. (Facts of the 2007 incident had already been revealed for limited purposes under § 1101, subd. (b), something we separately examine in part II.B., *post*.)

No abuse of discretion is shown up to that point. Yes, the drug nature of one of the three priors, due to a separate ruling (part I.B., *ante*), would be known to the jury, but: " 'While before passage of Proposition 8, past offenses similar or identical to the offense

on trial were excluded, now the rule of exclusion on this ground is no longer inflexible.' [Citations.]" (*People v. Hinton* (2006) 37 Cal.4th 839, 888.) Inasmuch as defendant had no priors *other than* drug-related priors, disallowing them on that rationale "would have given defendant a ' "false aura of veracity." ' [Citations.]" (*Ibid.*)

2. **Modification to show the nature of the 2006 offense.** Defendant argues that the court abused its discretion in twice revisiting its ruling and revealing the drug nature of the 2006 prior. We again discern no abuse. " 'The scope of inquiry when a criminal defendant is impeached with evidence of a prior felony conviction does not extend to the facts of the underlying offense.' [Citation.] However, if in 'admitting' the prior felony conviction 'the defendant first seeks to mislead a jury or minimize the facts of the earlier conviction' [citation] he may properly be questioned further. [Citation.]" (*People v. Shea, supra,* 39 Cal.App.4th at p. 1267.)

The reexamination came well into defendant's testimony. On direct examination, he had recounted his 17 years of drug use, how he was only induced by Officer Silver's persistence and feigned drug sickness to part with drugs he was buying for himself that night, and how he acted similarly earlier that year when, taken in by a female officer's act, he took her to a dealer where he used her money to make a purchase, kept a piece for himself, and handed the rest over to her. In essence, he painted himself as a user willing to help out a dope-sick fellow user. Then, on cross-examination, defendant explained generally the environment in which he lived as a user: "[T]he Tenderloin is a very sociable area where narcotics are very available. Sometimes you ask for help, if you need help. Sometimes you solicit for help. Sometimes you wash cars. Sometimes you help people move in and out of hotels. Sometimes you look for work. But your main objective is not the money. The objective is to get something for your addiction." Then came this exchange. "Q. Sometimes you sell drugs, right? [¶] A. No, I do not. [¶] Q. You don't sell drugs? [¶] A. No, I do not. [¶] . . . [¶] Q. On this date you sold drugs to Officer Silver; didn't you? [¶] A. No, I didn't. [¶] Q. You didn't take the $20? [¶] A. The $20 was offered as a gift or a tip. It was not given in the manner of asking for any money. It was, like, gee whiz, thank you, man. . . ."

Only afterward, upon a break in testimony, did the court revisit its ruling that the nature of defendant's 2002 and 2006 priors could not be revealed. It invited and heard extensive argument by counsel on both sides whether the defense had "opened the door" in direct by planting a false impression. The prosecutor agreed, while defense counsel argued that the testimony merely set up the entrapment defense and had "more or less" taken responsibility for the May 2007 offense. The court articulated its concerns this way: "It would have been okay if [defendant] got up on the stand and talked about he is a user today, he is going on and on and on about being a user. [¶] But it started off with talk about [his] history, [his] drug of choice, and [his] long-time history of 17 years. That's where direct started. And I have a notation, 'door opened,' question mark. That is what the court is focusing on." Extensive further argument did not ease the court's concern that it would be misleading for the defense to use 17 years of drug use to imply that defendant was just a user, while preventing the prosecution from rebutting that impression. The court said it would research the matter, explaining to defense counsel: "I did everything possible to keep this stuff out and keep it on a very limited basis. But I don't feel—I could be very wrong on this. But if this is something you are relying upon as being a user and that's his past conduct to show what he did today, then something tells me then the D.A. should be allowed to cross-examine him on the 2006 incident where he sold cocaine, I think, and heroin."

The court later announced for the record its conclusion that the defense "opened the door by putting [defendant's] character into evidence about just being a drug user only." It ruled: "I am going to allow the D.A. to do the following, if you choose to. So be very careful. You are going to be allowed to ask the defendant is it true that on 2006, whatever the date, that that conviction was for [section] 11352 of the Health and Safety Code"—a possession for sale. The court stressed that it would not allow revealing the nature of the 2002 conviction or that the 2006 offense occurred in San Francisco. It added, "I am trying to minimize as much as possible and keep it in control and understand that these jurors should only be talking about the facts of this case."

Ensuing cross-examination complied with the ruling. Defendant confirmed that he had "a 2002 conviction," a 2006 "felony possession-of-heroin for sale conviction," and the previously revealed May 2007 sales conviction.

On redirect examination, when defense counsel asked defendant about his May 2007 sale, defendant called his arrest and guilty plea "a very bad experience" and said, "I really had caught myself, promising that I was really never going to do anything like that again." This triggered the prosecutor to seek further modification on the theory that the remark "opened the door" to explore facts of the 2006 prior, and the 2002 prior as well. The court refused to reconsider its ruling on the 2002 prior. Agreeing with the defense that 2006 facts could not logically impeach a 2007 resolve, it narrowly ruled that the prosecutor could explore defendant's feelings about his 2006 arrest but could not go into the facts of the case. On recross-examination, when asked why he had felt he would never do something like that again, defendant explained: "A. I felt bad, stupid, about the encounter I had with the police. [¶] Q. Did you feel that way in 2006? [¶] A. Not necessarily. It was stupidity and anger. [¶] Q. What about in October [2007]? [¶] . . . [¶] A. Horrible."

We first put this controversy in perspective. While cases speak of not admitting the *facts* of a prior conviction, if a defendant attempts to minimize a prior felony or otherwise mislead the jury, "he may properly be questioned further." (*People v. Shea*, *supra*, 39 Cal.App.4th at p. 1267.) Here, after twice reexamining its ruling, the court wound up allowing only the bare nature of one further drug offense to be revealed, without disclosing any underlying facts. The court was certainly aware of, and exercised its discretion, in these rulings.

The first question then is how probative the offense's nature was. Defendant does not, and cannot, dispute that it directly countered his statement on cross-examination that he simply did not sell drugs. He argues, however, that: (1) he made no such statement on *direct* examination, where he stressed only that he was a long-time user; and (2) his characterization of the May 2007 conviction as giving away rather than selling the drug

did not deny the conviction, since Health and Safety Code section 11352, subdivision (a), is violated by a drug being sold, *furnished or given away*.

Taking the second point first, the trial court could reasonably view defendant's efforts to show a giving away as minimizing his prior. Indeed, defendant was using the same minimization strategy in this case. Thus while a giving away does indeed violate the statute, it was reasonable for the court to reason that jurors would find the absence of a monetary-gain motive somewhat mitigating and thus less impeaching of defendant's general credibility. Defendant did ultimately concede that his May 2007 conviction was for a drug "sale" (see fn. 3, *ante*).

On defendant's first point, he does not identify what legal authority he invokes by drawing his distinction between inconsistency arising on direct versus cross-examination. One of his cited cases addresses only the *temporal* relevance of a claimed inconsistency (*People v. Williams* (2009) 170 Cal.App.4th 587, 608 [address given at various times as conflicting with a denial of living with another person at particular times]), not whether inconsistency arose on direct versus cross-examination. If defendant has in mind former statutory authority expressly requiring that inconsistency arise in direct examination (e.g., *People v. McCarthy* (1948) 88 Cal.App.2d 883, 886-887 [former Pen. Code, § 1323]), he is not clear and cites no current authority for that concept.

Defendant does, however, imply that the prosecutor unfairly elicited his denial only to impeach it, and this brings to mind the doctrine against impeachment on collateral matters. "To determine the credibility of a witness, the trier of fact may consider, among other things, '[t]he existence or nonexistence of any fact testified to by' the witness. (Evid. Code, § 780, subd. (i).) Although it is improper to elicit otherwise irrelevant testimony on cross-examination merely for the purpose of contradicting it [citation], the trial court has discretion to admit or exclude evidence offered for impeachment on a collateral matter [citations]." (*People v. Mayfield* (1997) 14 Cal.4th 668, 748.) This doctrine does not help defendant. Whether he ever sold drugs was central, not collateral, to this case and affected as well the credibility of his entrapment claim that he really did not want to give or sell drugs to the undercover officer but was induced to do so. While

he remained ambiguous on this point in direct examination, he directly made a blanket denial of sales on cross-examination, leaving the prosecutor little choice but to attack it.[4]

Thus revealing the nature of the 2006 offense had high probative value, and the remaining question is whether the probative value was substantially outweighed by risks of prejudice within the meaning of section 352. We hold that the trial court acted within its discretion in finding no such outweighing. The carefully limited ruling, which forbad revealing facts of the 2006 prior, ensured against time delay, confusing the issues, or eliciting inflammatory facts. As already noted as to the May 2007 prior, the similar, drug-nature of the 2006 prior was just one factor, and there were no non-drug priors upon which to draw for impeachment.

Our conclusion leaves no reason to delve separately into the court's subsequent allowance of the same 2006 prior to be raised to explore defendant's redirect examination statement that his 2007 offense made him resolved never to "do anything like that again." The court again rejected the prosecutor's efforts to reveal the facts of the offense, and as a result, no impeachment came before the jury that was not properly in evidence already.

B. *Other-Crimes Evidence*

Defendant claims abuse of discretion under sections 352 and 1101, and due process error, in the admission of the heroin sale from May 2007. We find no such error.

We start with the facts provided to the court in briefs when the court was first asked to rule on the matter in limine, for we test rulings by what was before the court when it ruled. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405; *People's Home Sav. Bank v. Sadler* (1905) 1 Cal.App. 189, 193-194.) As set out earlier (fn. 3, *ante*): San Francisco

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[4] Defendant was giving a narrative where he used the pronoun "you" in place of the pronoun "one" in relating what drug users in the Tenderloin do generally to get by and feed their habits, like doing odd jobs or asking each other for help. In that light, the trial court could reasonably construe the prosecutor's immediately following question—"Sometimes you sell drugs, right?"—as meaning, "Sometimes *one sells* drugs, right?" A lack of defense objection to that question reinforces that interpretation. While vocal inflection could alter that impression, we infer in support of the trial court's ruling that defendant's *obviously personal* disclaimer, "No, I do not," came as a surprise to the prosecutor.

officers were conducting a buy-bust operation on Jones Street, and Officer Sylvia Petrossian was the buy officer. She encountered defendant on Jones Street and asked him if he had heroin. Defendant said, " 'yeah, follow me,' " and together they approached a man later identified as Gerald Thomas, with whom defendant had a conversation. Thomas handed defendant some heroin. Defendant then handed the heroin to Officer Petrossian. In exchange, the officer handed defendant $20 of marked city funds. When officers arrested defendant, they recovered the marked city funds and heroin. Officers also recovered heroin from Thomas.

Consistent evidence of the incident came in brief testimony by Petrossian, who added that the incident occurred around 4:30 p.m., that the substance recovered weighed .18 grams, and other details. Defense counsel cross-examined Petrossian on drugs sometimes being sold by two people, one handling the sale and/or drugs while another acts as "a hook" to lead customers in. This sparked further questions by each side, and a criminalist who had tested the substance confirmed its weight and drug presence.

Defendant testified briefly about the May 2007 incident, relating that Petrossian, posing as a heroin user, asked if he knew where she could get some heroin. Petrossian said she had only a few dollars, but then produced $20. He took her to Thomas, whom he knew sold, and bought heroin for her but kept a piece for himself and his own addiction.

"[S]ection 1101, subdivision (a) generally prohibits the admission of a criminal act against a criminal defendant 'when offered to prove his or her conduct on a specified occasion.' Subdivision (b), however, provides that such evidence is admissible 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity . . .).' To be admissible, such evidence ' "must not contravene other policies limiting admission, such as those contained in . . . section 352." [Citation.]' [Citation.] Under . . . section 352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citations.] [¶] We review for abuse of discretion a trial court's rulings on relevance and admission or

exclusion of evidence under . . .sections 1101 and 352. [Citations.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 229-230.)

"To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. [Citation.] Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a ' "pattern and characteristics . . . so unusual and distinctive as to be like a signature." ' [Citations.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 369-370.) "A lesser degree of similarity is required to establish relevance on the issue of common design or plan. [Citation.] For this purpose, 'the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.' [Citation.]" (*Id.* at p. 371.) "The least degree of similarity is required to establish relevance on the issue of intent. [Citation.] For this purpose, the uncharged crimes need only be 'sufficiently similar [to the charged offenses] to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance.' [Citations.]" ' [Citation.]" (*Ibid.*)

The court below allowed evidence of the May 2007 incident to show knowledge and common scheme or plan, and no argument is raised against the sufficiency or clarity of instructions on those limited purposes.[5] Defendant argues against admission for

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[5] "During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.

"The People presented evidence that the defendant committed another narcotics offense that was not charged in this case, specifically, May 3, 2007, at 201 Turk Street, hereinafter referred to as the 'May 2007' incident. You may consider this evidence . . . only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense, the May 2007 incident.

"If you decide that the defendant committed the . . . May 2007 incident, you may, but you are not required to, consider . . . that evidence . . . for the limited purpose of deciding whether or not the defendant knew of its presence as a controlled substance, the defendant knew of the substance's nature and character as a controlled substance, or the defendant had a common plan or scheme to commit the offense alleged in this case on October 11th, 2007.

knowledge not because a past drug deal was irrelevant to show he knew it was heroin he sold or offered the officer in the charged offense, but because the court adopted that basis *over his offer below to stipulate* to knowledge, i.e., when the element was not seriously in dispute. The People counter that knowledge was placed at issue by defendant's plea of not guilty, whether or not he ultimately chose to contest the matter (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4 (*Ewoldt*)); that the prosecution could not know for sure what the defense strategy would be; and that an offer to stipulate does not require the People to accept if it would deprive their case of its persuasiveness and forcefulness. (*People v. Scheid* (1997) 16 Cal.4th 1, 17.)[6]

We do not resolve the knowledge issues. It is enough to conclude, as we do, that the evidence was properly admitted to show common design or plan, for if it was, there

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"In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense from May 2007 and the charged offense of October 11, 2007. Do not consider this evidence from the May 2007 incident for any other purpose except for the limited purpose of whether or not the defendant knew of its presence as a controlled substance, the defendant knew of the substance's nature and character as a controlled substance, or the defendant . . . had a common plan or scheme to commit the offense alleged in this case on October 11, 2007.

"Do not conclude from this evidence of the May 2007 incident that the defendant has a bad character or is disposed to commit the crime on October 11, 2007.

"If you conclude that the defendant committed the uncharged offense in May 2007, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Heath and Safety Code, section 11352 [subdivision] (a), sale of a controlled substance, to wit, heroin, on October 11, 2007. The People must still prove each element of the charge beyond a reasonable doubt."

This same instruction had been read by the court just before testimony on May 2007 was heard, and the court at that time prefaced its reading with this caution: "Remember what I said, if the People have not proven their case beyond a reasonable doubt as to October 11th, 2007, and you have heard some information of an alleged incident that happened months or weeks prior, you can't convict a defendant just because of . . . the first incident."

6 The People also devote much briefing to urging that the May 2007 incident was relevant to intent and motive, although this is largely beside the point, since the evidence was neither admitted nor accompanied by instruction on those bases (fn. 5, *ante*).

was no conceivable harm in its being admitted also to show knowledge. Defendant has conceded that he never disputed knowledge and, in fact, relied in part on his familiarity with and regular use of heroin to support claimed entrapment.

" 'The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done.' . . . The existence of such a design or plan also may be proved circumstantially by evidence that the defendant has performed acts having 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.] Evidence of a common design or plan, therefore, is not used to prove the defendant's intent or identity but rather to prove that [he] engaged in the conduct alleged to constitute the charged offense." (*Ewoldt*, *supra*, 7 Cal.4th at pp. 393-394; fn. omitted.) "This distinction . . . is subtle but significant. Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an elements of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation.] For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it." (*Id.* at p. 394, fn. 2.)

The situation here parallels the "subtle" distinction made in *Ewoldt*. There was ultimately no dispute here that, following a street transaction, Officer Silver wound up with drugs and defendant wound up with Silver's $20. A key factual dispute, however, was whether the $20 was handed over during the transaction (Silver's account) or as a "tip" only after the fact (defendant's account). Evidence that defendant had sold drugs to another undercover officer in virtually the same spot on the same street, just five months earlier, was highly probative in resolving that dispute. Paraphrasing *Ewoldt*'s example, the prior incident bore on whether defendant got the $20 unexpectedly or, rather, got it as

an expected part of the transaction. That issue, in turn, bore heavily on defendant's claim that he gave the officer the drug out of compassion.[7]

Defendant's efforts to cast the two incidents as "substantially different" and "[nothing] more than independent, spontaneous, unplanned acts," are ludicrous. These incidents occurred five months apart (May and October 2007), in alcoves in the same block (201 and 251 Turk St.), in an area noted for heroin sales, at similar times (4:30 p.m. and 9:30 p.m.), and for the same or similar amounts of money ($20) and drugs (.18 and .44 grams). Subtle differences went to the weight, not admissibility, of the evidence. Defendant urges: "If being in a particular neighborhood where drugs are bought and sold non-stop is evidence of a common plan to sell heroin, then all buyers and sellers must be engaged in a similar scheme." We reject his premise. These incidents exceeded "being in" the neighborhood; defendant engaged in similar drug transactions in both instances.

In applying section 352: "[T]he trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers 'substantially outweigh' probative value, the objection must be overruled. [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

If drug use and dealing may risk emotional bias of the sort section 352 is designed to guard against (see generally *People v. Hart* (1999) 20 Cal.4th 546, 616 [evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues]), that is far less so here, where revealing defendant's drug use was vital to the defense strategy, and where the prior incident was no more inflammatory than the charged conduct. There was little risk of undue time consumption, and the fact that defendant was convicted for the prior incident

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[7] Defendant makes too much of this part of the entrapment instructions (CALCRIM No. 3408): "When deciding whether the defendant was entrapped, consider what a normally law-abiding person would have done in this situation. Do not consider the defendant's particular intentions or character, or whether the defendant had a predisposition to commit the crime." This does not mean that a preexisting intent to sell was irrelevant in the case, only that is was irrelevant in applying the "normally law-abiding person" standard of the defense.

reduced any risk of jurors wanting to punish him for that incident and thus confusing the issues. (*Ewoldt, supra*, 7 Cal.4th at p. 405.) No abuse of discretion appears in the court's determination that the May 2007 incident had probative value that was not substantially outweighed by the risk of undue prejudice.

C. *Denial of Request to Strike Enhancements*

Defendant was convicted of violating Health and Safety Code section 11352, and alleged sentence enhancements under Penal Code section 11370.2, would mandate, in addition to any other authorized punishment, a consecutive three-year term for each prior felony conviction of certain drug violations, including Health and Safety Code sections 11351 (possession for sale) and 11352, subdivision (a) (transport sale or giving away.) In bifurcated post-verdict proceedings, the court found true all three allegations—for the 2006 possession for sale, the 2002 and May 2007 transport, sale or giving away priors. These were the same priors used for general impeachment and/or non-propensity issues (fn. 3, *ante*) as discussed earlier in this opinion.

Absent a clear legislative direction to the contrary, a court has discretion under Penal Code section 1385, subdivision (c), to dismiss or strike an enhancement, or strike the additional punishment for that enhancement, in the furtherance of justice (*People v. Meloney* (2003) 30 Cal.4th 1145, 1155), and the parties agree that there was discretion to strike as to Health and Safety Code section 11370.2 enhancements. (*People v. McCray* (2006) 144 Cal.App.4th 258, 267 [unauthorized judgment staying imposition of Health & Saf. Code, § 11370.2 enhancements reversed and remanded with directions to impose them, or strike them under Pen. Code, § 1385].)

The parties also appear to agree on our standard of review: "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people

might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

Since " ' all discretionary authority is contextual,' " we begin by examining the purposes of the enhancement provision at issue. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 377, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) The provision here and a drug-quantity-based enhancement provision (Health & Saf. Code, § 11370.4) were enacted together " 'to punish more severely those persons who are in the regular business of trafficking in, or production of, narcotics and those persons who deal in large quantities of narcotics as opposed to individuals who have a less serious, occasional, or relatively minor role in this activity.' (Assem. Bill No. 2320 (1985-1986 Reg. Sess.) ch. 1398, § 1.)" (*People v. Garcia* (1989) 211 Cal.App.3d 1096, 1101.) While Health and Safety Code section 11370.2, unlike its co-provision Health and Safety Code section 11370.4 does not "add additional punishment because of the amount of drugs possessed, it adds such additional penalties because the person who possesses the drugs has also possessed drugs for sale in the past and . . . has actually suffered a prior conviction for possession for sale. . . . [T]he Legislature intended, and continues to intend, to more severely punish those who have suffered prior convictions for sale of drugs because those persons are more likely to be in the regular business of trafficking, having dealings, in drugs." (*Ibid.*)

Defendant argues that these enhancements were "outside the spirit of the law" because: although he sold drugs to other addicts, he was homeless and impoverished, "not living high," and more interested in getting fixes than monetary profit; he posed no "great risk to society" beyond "nuisance value" and was a danger "mostly to other heroin addicts"; as two of the priors show, he was not "soliciting sales," but responding to undercover officers who solicited him; he is using drugs to self-medicate for pain; his last robbery was many years earlier; he had lacked opportunities to deal seriously with his

addiction; and he was now 53 years old, thus less likely to pose risks to others. These arguments track those made below, on defense counsel's oral request that the court strike the enhancements in the interest of justice.

The court acknowledged those factors but was persuaded against striking by defendant's long record and more than a dozen probation violations. "[D]efendant has gone to prison a minimum of five times and one of which involved robbery. He has also been placed on probation . . . in 1996-97 where he was placed on probation and then was violated on probation, and . . . the D.A. has alluded to the many violations. [¶] I do not see the interests of justice of the court striking the three prior convictions . . . . [¶] But I will note that the defendant was on two felony probations at the time that this case was committed. And I do understand that he is not the, as [defense counsel] has said, the high end. But there is a problem, and the court—I cannot help but note how the court tried to deal with the problem. In 2006 . . . he was charged with 11352. Within a year he was placed on another felony probation for 11352, and he was on two felony probations. And there is something to be said about people being banked, but there is also something to be said about [defendant having] to take responsibility for his actions. [¶] . . . [¶] Because of [his] age, I am taking that into consideration, also the amount of heroin that was involved and the facts that the court has heard." The court imposed all nine years of enhancements but selected the low term of three years for the new offense.

We cannot say that the decision was irrational or outside the spirit of the law. The provision at issue was aimed, not at "high end" volume distributors, but at regular sellers of all types. (*People v. Garcia*, *supra*, 211 Cal.App.3d at p. 1101.) And, as long observed in sentencing cases generally, "drug addition is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment. [Citations.]" (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511; *In re Handa* (1985) 166 Cal.App.3d 966, 973-974.) Presentence reports showed that defendant had a heroin habit costing $60 to $100 daily and had to meet it by selling drugs. He had "never made any effort to terminate his drug lifestyle," despite being offered "numerous opportunities in the past on formal supervision"; he had

"actively chosen to ignore the court's orders and terms of probation and parole," had 15 parole violations since 1996, and was "a habitual criminal who will continue to be involved in criminal behavior whenever he is in the community." As recently as 2006, defendant had conceded his habit being a "root cause of his criminal behavior" and expressed "a willingness now to participate in drug counseling" and obey court orders; he was to be referred then to "a structured drug treatment program . . . ." None of that produced change, and we reject his appellate view that, since he only sold to other addicts, he did not pose "any great risk to society[.]" Addicts are, unfortunately, part of our society. True, his last robbery convictions were old, but his constant record of criminality dated from 1968, with nine prison stints for theft and drug related offenses and the only breaks in new offenses being when he was incarcerated.

No abuse of discretion appears.

D. *Conduct Credits*

Defendant was sentenced on October 2, 2008, and granted 543 days of presentence credit, comprised of 363 days actual time served plus 180 days of conduct credits under the then-current version of Penal Code section 4019, which allowed two days of conduct credit for every four days actually served. Penal Code section 4019 was amended on January 25, 2010, to effectively allow four days of total credit for every two days actually served, and defendant asks that we give him the retroactive benefit of that change by modifying his total credits to 725 days (363 actual plus 362 conduct). The People do not dispute his calculation under the new formula but argue that the amendment does not apply retroactively.

This issue has spawned a split of authority in the Court of Appeal, and on June 9, 2010, the Supreme Court granted review in the two lead cases that developed the rift. (*People v. Brown* (2010) 182 Cal.App.4th 1354, S181963; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, S181808.) As the parties are aware, this Division recently declared its position in *People v. Landon* (2010) 183 Cal.App.4th 1096, 1099, 1105-1108 (petition for review filed May 20, 2010), considering the arguments offered here and holding that

the amendment applies retroactively. We adhere to that view and accordingly modify the judgment as defendant urges.

III. CONCLUSION

The judgment is affirmed as modified to reflect 725 total days of presentence credits (363 actual plus 362 conduct). The trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

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Richman, J.

We concur:

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Kline, P.J.

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Lambden, J.